INTRAKOTA KOMPOSIT SDN BHD & ANOR

v.

SOGELEASE ADVANCE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: D4-24-116-2004]
1 NOVEMBER 2004

COMPANY LAW: *Arrangement and reconstruction - Ailing company - Proposed restructuring scheme - Meeting of creditors - Application by dissenting creditor to stop meeting - Whether without merits - Majority of creditors agreeable to scheme - Estoppel - Whether to be applied against creditor - Companies Act 1965 ss. 176(1), (3), (10)*

The intervenor/creditor had obtained a judgment for RM17 million *inter alia* against the second applicant (a subsidiary of the first applicant). Pending appeal thereon, and pending the presentation of a scheme to the creditors under s. 176 of the Companies Act 1965 ('the Act') to re-structure its debt, the second applicant applied for and obtained: (i) a stay of execution of the judgment; (ii) an injunction before Vincent Ng J restraining the intervenor from commencing winding-up proceedings against it; and (iii) a restraining order ('RO') pursuant to s. 176(10) of the Act. Thereafter, on 28 April 2004, an order ('the *ex parte* order') was granted to the second applicant allowing it to convene a creditors' meeting to consider and vote on the restructuring scheme ('the composite scheme'). The intervenor initially went along with the composite scheme – succeeding even to persuade the second applicant to make adjustments to pay at least RM13.5 million of the debt outstanding to it – but had subsequently taken a dissenting view on the same. And so, before the composite scheme was put to vote, the intervenor filed an application, vide encl. 9 herein, to set aside the *ex parte* order and the composite scheme (prayer 4), and alternatively to exclude itself from the arrangement of the scheme (prayer 5), arguing, in essence, that the scheme was not commercially viable and that the applicants were insolvent and ought to be liquidated. The intervenor was adamant, and remained defiant, notwithstanding that 13 of the 14 scheme creditors (the sole dissenter being the intervenor itself), representing approximately 87% of the debt to the scheme creditors, had agreed to consider the composite scheme.

Held (dismissing the application):

[1] Both prayers (4) and (5) of encl. 9 were premature and they should not be granted at this point of time because there was no "scheme" to speak of at the present time. There would be a scheme only if the proposal before the creditors was voted and agreed upon on 28 May 2004 and sanctioned by this court as envisaged under s. 176(3) of the Act. (p 282 c)

[2] The intervenor had successfully persuaded the second applicant to advance the composite scheme in such a way that it stood to recover RM13.5 million of the debt owed and no objection was raised as to the propriety of its conduct as a scheme creditor. The intervenor, nonetheless, made an about turn and purported to set aside the entire proposal and the meeting to consider it. On the obtaining facts, the doctrine of estoppel must apply against the intervenor. (p 291 a-b)

[2a] The intervenor must also be barred from proceeding with prayers (4) and (5) on account of Vincent Ng J's injunctive order. It was implicit in the said order that the proposed composite scheme ought to be allowed to take its course under s. 176 of the Act. The attempt to stop the scheme from being tendered in the court-convened meeting of 28 May 2004 was a collateral attempt to destroy the injunctive order and was therefore unlawful. (p 292 b-f)

[3] Bearing in mind that the 13 other creditors had agreed in principle to support the composite scheme, the scheme would in all likelihood be approved on 28 May 2004 in compliance with s. 176(3) of the Act. Rightly, this court must decline to interfere in what 13 out of 14 creditors felt about the composite scheme, namely, that it was a reasonable and commercially viable scheme. This court would therefore exercise its discretion by allowing the composite scheme to be considered and voted upon. (p 300 f-h)

[4] The intervenor did not show that the composite scheme was bad, or that it was not to be approved or was bound to fail. The intervenor's complaints were clearly without merits. Consequently, encl. 9 was only an attempt to stifle the scheme at the 11th hour notwithstanding that the applicants and all other scheme creditors were prepared to consider the same. The court must allow the majority to have their say as intended by s. 176 of the Act. (p 301 b-e)

Case(s) referred to:

Butterworth Products & Industries Sdn Bhd, Re [1991] 3 CLJ 1762; [1991] 2 CLJ (Rep) 385 HC ***(refd)***

Crystal Establishment Berhad & Ors v. Hong Leong Bank Berhad & Ors [2000] I LNS 44 ***(refd)***

Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd [2001] 4 SLR 35 ***(refd)***

Dawson's Bank Ltd v. Nippon Menkwa Kabushiki Kaisha [1935] LR 62 Ind App 100 ***(refd)***

Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 FC ***(refd)***

FT Eastment & Sons Pty Ltd v. Metal Roof Decking Supplies Pty Ltd [1977] 3 ACLR 69 ***(refd)***

Hopgood v. Brown [1955] 1 All ER 550 ***(refd)***

In re English, Scottish, And Australian Chartered Bank [1893] Ch D 385 ***(refd)***

In Re Foursea Construction (M) Sdn Bhd [1998] 3 CLJ 135 HC ***(refd)***

In the Matter of Chevron (Sydney) Ltd (1962) Vic Lexis 368 ***(refd)***

Kim Wah Theatre Sdn Bhd v. Fahlum Development Sdn Bhd [1990] 2 MLJ 511 HC ***(refd)***

Low v. Bouverie [1891] 3 Ch 82 ***(refd)***

Maclaine v. Gatty [1921] 1 AC 376 ***(refd)***

Mokhtar v. Arumugam [1959] 25 MLJ 232 CA ***(refd)***

Pilecon Engineering Bhd v. Ramaja Jaya Sdn Bhd [1997] 1 MLJ 808 HC ***(refd)***

Re A and C Constructions [1970] SASR 565 ***(refd)***

Re Artistic Color Printing Co [1880] 14 Ch D 502 ***(refd)***

Re Avram Investments Pty Ltd [1992] 8 ACSR 574 ***(refd)***

Re Egnia Pty Ltd (in liq) [1991] 6 ACSR 640 ***(refd)***

Re GAE Pty Ltd [1962] VR 252 ***(refd)***

Re Gazette Constructions Pty Ltd [1984] 10 ACLR 140 ***(refd)***

Re Glendale Land Development (in liquidation) [1982] 7 ACLR 171 ***(refd)***

Re Hellenic & General Trust Ltd [1975] 3 All ER 382 ***(refd)***

Re Jax Marine-Pty Ltd [1967] 1 NSWR 145 ***(refd)***

Re K Rees Emporium Ltd [1969] VR 981 ***(refd)***

Re K Rees Emporiums Ltd [1969] Vic Lexis 156 ***(refd)***

Re Kuala Lumpur Industries Bhd [1991] 3 CLJ 2867 HC ***(refd)***

Re Norfolk Island and Byron Bay Whaling Co [1969] 90 WN (Pt 1) (NSW) 351 ***(refd)***

Re Savoy Hotel Ltd [1981] Ch 351 ***(refd)***

Re Wu Investments Pty Ltd [1993] 10 ACSR 636 ***(refd)***

Sovereign Life Assurance Co v. Dodd [1892] 2 QB 573 CA ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827 HC ***(refd)***

Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677 HC ***(refd)***

Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 ***(refd)***

Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd [1979] 2 MLJ 4 ***(refd)***

Woodhouse AC Israel Cocoa Ltd SA v. Nigerian Produce Marketing Co Ltd [1972] AC 741 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(1), (3), (10)

For the applicants - Ramesh Sathasivam (Cheah Sin Chin & Chua Boon Yen); M/s Adnan Sundra & Low

For the intervenor - Tan Poh Meng (Chan Gek Choo); M/s PM Tan, Chan & Partners

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Enclosure 9

By way of encl. 9, the intervenor sought for the following prayers:

(1) that leave be granted to Sogelease Advance (Malaysia) Sdn Bhd, the proposed Intervenor to intervene in these proceedings;

(2) that the Applicants do serve the Proposed Intervenor with copies of all proceedings and other cause papers filed herein;

(3) that the meetings of the Scheme Creditors fixed for 28 May 2004 be postponed until the final disposal of this Summons in Chambers;

(4) that the *ex parte* order dated 28 April 2004 and the Composite Scheme be set aside;

(5) in the alternative, that the Proposed Intervenor be excluded from the Composite Scheme as a Scheme Creditor;

(6) costs;

(7) liberty to apply;

(8) such further or other reliefs as this Honourable Court deems fit.

The parties have consented to prayers (1) and (2) of encl. 9 on 18 May 2004 and I have nothing further to say to that. Prayer (3) of encl. 9 for a deferral of the court convened meeting fixed for 28 May 2004 has become irrelevant and academic because this court has decided to deliver its decision in regard to prayers (4), (5), (6) and (7) on 27 May 2004 and that would be one day before the date of the court convened meeting. In the circumstances, only prayers (4), (5), (6) and (7) of encl. 9 will be addressed in this judgment. Out of these four prayers, it would seem that prayers (4) and (5) form the primary objects of encl. 9. It would be pertinent to state that both prayers (4) and (5) of encl. 9 were phrased and framed in the alternative.

Facts Of The Case

The intervenor has obtained judgment against the second applicant and DRB-HICOM Berhad (hereinafter referred to as "DRB") on 10 December 2001 for the sum of RM13,566,786.31 as at 10 February 2000 with continuing interest until payment *vide* Kuala Lumpur High Court Civil Suit No: D1-22-886-2000 (hereinafter referred to as the "main suit") in relation to the hire purchase facilities granted to the second applicant and guaranteed by DRB. The amount outstanding under the judgment as at 30 April 2004 was RM18,106,488.35. The appeal by the second applicant and DRB against the judgment was dismissed by the judge on 21 January 2003. The second applicant and DRB have since filed an appeal to the Court of Appeal against the decision of the judge. The second applicant and DRB have since filed an application to stay execution of the judgment in the main suit (hereinafter referred to as the "stay proceedings") pending their appeal to the Court of Appeal and pending a proposed s. 176 scheme proposed by the second applicant. In tangent and simultaneously with the stay proceedings, the second applicant and DRB also filed an originating summons no: D1-24-93-2003 (hereinafter referred to as the "injunction proceedings") to restrain the intervenor from commencing winding-up proceedings to enforce the judgment pending their appeal to the Court of Appeal and pending a proposed s. 176 scheme by the second applicant. The reason why the second applicant and DRB took out the injunction proceedings as well as the stay proceedings was because an order for stay of execution proceedings would not cover winding up proceedings whereas an injunction would. The second applicant and DRB wanted to prevent the intervenor from commencing winding-up proceedings against them.

Both the stay proceedings and injunction proceedings were heard together and on 27 April 2004 the judge gave similar orders in respect of both matters. The terms of both the orders provide for the second applicant and DRB to pay the sum of RM17 million (being the judgment sum as at 30 June 2003) into the parties' solicitors' joint account by 31 May 2004 and that in the event the amount was not paid, both the orders for an injunction and the stay would be discharged. As of to date, the said sum has not been paid.

Together with the stay proceedings and the injunction proceedings, the second applicant had further obtained a restraining order on 21 June 2003 (hereinafter referred to as the "RO") pursuant to s. 176(10) of the Companies Act 1965 *vide* Kuala Lumpur High Court Originating Summons No: D4-24-146-2003 (hereinafter referred to as the "RO Suit") for a period of nine months to allow the second applicant to put up a proposed scheme of arrangement. The RO was subsequently extended *ex parte* on 16 March 2004 for a further 120 days

when the second applicant sought for more time to put together their proposed scheme of arrangement. Incidentally, it is ideal to take note that the first applicant was not a party to the RO Suit.

On 24 March 2004, the intervenor obtained an order to intervene in the RO Suit. The order was obtained with the consent of the second applicant. The intervenor had expected the second applicant to put forward their finalised scheme of arrangement in the RO Suit. It follows that the application to seek an order to convene the creditors' meeting would have been filed in the same RO Suit and the intervenor would have been served with all the cause papers in due course. Instead the applicants, exercising their legal rights, proceeded to file separate proceedings *vide* this very originating summons.

By 19 April 2004, the second applicant was expressly made aware that the proposed intervenor intends to apply to set aside the composite scheme once it is put before this court. The intention to do so was stated in paragraph 4 of an affidavit affirmed on 19 April 2004 by Yap Teck Yell filed in the main suit (to oppose the application for the stay of execution) which was served on the applicants' solicitors on 19 April 2004 (see exh. "YTY8" of the intervenor's third affidavit).

On 27 April 2004, whilst attending the Kuala Lumpur High Court for the stay proceedings and the injunction proceedings, the intervenor's solicitors came to know from the applicants' solicitors that an application has been filed to convene a creditors' meeting in a new originating summons rather than under the RO Suit. On 28 April 2004, the following day, the intervenor's solicitors wrote to the applicants' solicitors to remind them of the intervenor's intention to oppose the composite scheme and requested that all the cause papers relating to the new originating summons be served on the intervenor's solicitors (see exh. "YTY3" of encl. 10 – the intervenor's first affidavit).

Some eight (8) days later – that would be on 6 May 2004, the applicants' solicitors replied to the intervenor's solicitors stating that they were not obliged to serve the cause papers filed in this originating summons on the grounds that the order to intervene obtained by the intervenor in the RO Suit relate only to the RO Suit and that in any event the applicants do not have sufficient copies of the cause papers to serve onto the intervenor (see exh. "YTY-4" of encl. 10).

On 6 May 2004, the applicants' solicitors served a copy of the Explanatory Statement dated 6 May 2004 issued in connection with the composite scheme on the intervenor directly.

On 11 May 2004, the intervenor filed in court and served the summons in chambers on the applicants' solicitors.

On 14 May 2004, the applicants' solicitors served the cause papers of this originating summons on the intervenor's solicitors.

The Prematureness Of Prayers (4) And (5) Of Encl. 9

Prayer (4) of encl. 9 sought to set aside the *ex parte* order dated 28 April 2004 and the composite scheme. And by way of an alternative, prayer (5) of encl. 9 sought to exclude the intervenor from the composite scheme as a scheme creditor. In my judgment, both prayers (4) and (5) of encl. 9 were premature and they should not be granted at this point of time because, in the first place, there was no "scheme" to speak of at the present time. There will be a scheme only if and until the proposal before the creditors was voted and agreed upon on 28 May 2004 and then sanctioned by this court as envisaged under s. 176(3) of the Companies Act 1965. It must be borne in mind that this court cannot set aside something which was not in existence yet. That would be basic common sense.

Now, the setting aside of the *ex parte* order under prayer (4) of encl. 9 cannot be read independently of or alternatively to the setting aside of the scheme. It must be emphasised that the intervenor has employed the word "and", and it gave the impression that the intervenor has envisaged that the prayer be read as a whole and that the prayer should either stand or fall. The alternative prayer can be seen in prayer (5) of encl. 9. In short, the intervenor was seeking for prayer (4) of encl. 9 to be granted which meant that the intervenor wanted the "scheme" to be set aside. This was certainly premature.

It must be emphasised that the setting aside of the *ex parte* order cannot be made through prayer (8) of encl. 9 which was a prayer for further or other reliefs because, firstly, the intervenor has specifically prayed for in prayer (4) of encl. 9 that the setting aside of the *ex parte* order be made together with the setting aside of the scheme. Secondly, it would be inconsistent with the thrust of the intervenor's prayers which was to set aside the scheme. It would be ideal, at this juncture, to refer to the case of *Mokhtar v. Arumugam* [1959] 25 MLJ 232, a decision of the Court of Appeal with a coram of Thomson CJ, Smith and Ong JJ There, Smith J, writing for the Court of Appeal remarked at p. 233 of the report:

> In *Cargill v. Bower* 10 Ch. D. 502, at page 508, Fry J. said: 'You cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for'.

Lord Atkin's '*Encyclopaedia of Court Forms and Precedents in Civil Proceedings'*, Volume XIII at page 177 says: 'If damages form part of the relief sought, they should be distinctly claimed, although an omission to ask for damages in the pleadings will not prevent them being given if justice so require it.' The case referred to in the footnote is that of *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1892] 1 Ch. 120, C.A.

I would gratefully adopt the speech of Smith J, in that case and I will now proceed to examine the subject matter of encl. 9 under different sub-heads.

The schemes under s. 176 of the Companies Act 1965

It is appropriate to reproduce verbatim s. 176 of the Companies Act 1965 and I shall do so now:

PART VII

ARRANGEMENTS AND RECONSTRUCTIONS

176. Power to compromise with creditors and members.

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs.

(2) A meeting held pursuant to an order of the court made under sub-s. (1) may be adjourned from time to time if the resolution for adjournment is approved by a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting.

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall if approved by order of the court be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(4) The court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.

(5) An order under sub-s. (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the court may determine and as may be specified in the order.

(6) Subject to sub-s. (7), a copy of every order made under sub-s. (3) shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(7) The court may, by order, exempt a company from compliance with the requirements of sub-s. (6) or determine the period during which the company shall so comply.

(8) Where any such compromise or arrangement (whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies) has been proposed, the directors of the company shall:

(a) if a meeting of the members of the company by resolution so directs, instruct such accountants or advocates or both as are named in the resolution to report on the proposals and forward their report or reports to the directors as soon as may be; and

(b) make the report or reports available at the registered office of the company for inspection by the shareholders and creditors of the company at least seven days before the date of any meeting ordered by the court to be summoned as provided in sub-s. (1).

(9) Every company which makes default in complying with sub-s. (6) or (8) and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit.

Power of Court to restrain proceedings.

(10) Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes.

(10A) The court may grant a restraining order under sub-s. (10) to a company for a period of not more than ninety days or such longer period as the court may for good reason allow if and only if:

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to sub-s. (1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under sub-s. (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

(10B) The person approved or appointed by the court to act as a director of the company under sub-s. (10A) shall have a right of access at all reasonable times to the accounting and other records (including registers) of the company, and is entitled to require from any officer of the company such information and explanation as he may require for the purposes of his duty.

(10C) Any disposition of the property of the company, including things in action and any acquisition of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the court shall, unless the court otherwise orders, be void.

(10D) Where a company disposes or acquires any property, other than in the ordinary course of its business, without leave of the court, every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or one million ringgit or both.

(10E) Where an order is made under sub-s. (10), every company in relation to which the order is made shall, within seven days:

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in a daily newspaper circulating generally throughout Malaysia,

and every company which makes default in complying with this subsection and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: One hundred thousand ringgit.

(10F) An order made by the court under sub-s. (10) shall not have the effect of restraining further proceedings in any action or proceeding against any person other than the company that had applied for the restraining order.

(10G) For the purpose of sub-s. (10F), the term 'any person' includes a guarantor of the company.

That section provides a statutory form wherein creditors voting at creditors' meetings may agree to a scheme of arrangement which, if approved by the court, will bind dissenting creditors. This type of arrangement would float a flagging company heavily burdened with debt to survive provided that there is a possibility that the business may be viable and the company may persuade its creditors that it is in their best interest to accept a compromise of their debts. So, instead of enforcing their debts or winding up the company, the creditors will accept less than the full amount in final satisfaction of their debts. Section 176 of the Companies Act 1965 is designed to save a company in difficulty and it is the best alternative to liquidation. As far as the company is concerned, s. 176 of the Companies Act 1965 is a life saving device designed by the legislators and it will be resorted to, from time to time.

So, when a debtor company's financial health begins to deteriorate, slowly but surely, then we will see a situation where the interests of the company and its creditors become diametrically opposed. It is often the intention of the company to stay and remain afloat in order to do business and return to solvency. But, on the other hand, creditors will make a rush for the assets of the company because they sense the risk that the company's assets may be further depleted. However, some kind creditors may be persuaded that it is in their best interest to re-structure and compromise their debts by keeping the company afloat instead of enforcing their debts or winding up the company. The nasty creditors will stick to their guns, so to speak, and they will refuse to re-structure and compromise and they would prefer that the company be wound up. So, it is common place that unless there is a unanimous agreement of creditors to the notion of any debt restructuring then any attempt at restructuring would be an exercise in futility. It must be borne in mind that it only takes one nasty creditor to initiate a winding-up of the company.

The law recognises that it is important that a company in financial distress is able to propose a debt re-structuring to its creditors and that where such proposal is genuine, commercially reasonable and made in good faith the law has made provisions to facilitate its success. The embodiment of this law in Malaysia can be found in s. 176 of the Companies Act 1965. That section may be invoked by way of an application to the court and the court may assist the company in one of three ways:

(i) it may grant an order restraining legal action from being taken out or continued against the distressed company and this is provided for under s. 176(10) of the Companies Act 1965;

(ii) it may grant an order to call for meetings of creditors and this is provided for under s. 176(1) of the Companies Act 1965; and

(iii) it may grant an order to sanction the scheme if at least 1/2 in number of creditors representing at least 3/4 in value of the debt compromised and in the meeting have agreed to the proposal or proposals as amended and this is provided for under s. 176(3) of the Companies Act 1965.

I will now say something about s. 176(10) of the Companies Act 1965. It is an important feature of the statutory scheme in that it serves to prevent creditors dissenting to the proposal from effectively scuttling it by winding up the company. It also serves to ensure that creditors do not prematurely deplete the company of its assets which may result in the frustration of the proposal. This is purely to facilitate the negotiations and development of the proposed debt restructuring.

Put in a different way, s. 176(10) of the Companies Act 1965 allows an application to be made in order to "restrain further proceedings" prior to winding-up where a "compromise or arrangement has been proposed". The court may be persuaded to adjourn a winding-up petition if the company can show solid evidence that a rescue attempt is under way. The court's power to restrain proceedings is all encompassing. It extends to restraining the "proceedings in any action or matter" (*Re Artistic Color Printing Co* [1880] 14 Ch D 502, 504, 505). VC George J (as he then was) explained this section lucidly in the case of *Re Kuala Lumpur Industries Bhd* [1991] 3 CLJ 2867:

> In my view, what must be available to the court when considering a s. 176(10) application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further, the court has to be satisfied that there is or that there would be a *bona fide* s. 176(1) application.

In other words, the proposal should be known publicly – at least to one or more of the creditors who are likely to be affected. And that the proposal should be clear and well defined (*Re GAE Pty Ltd* [1962] VR 252).

It is now appropriate to say something about s. 176(1) of the Companies Act 1965. Under it, an application may be made to the court for meetings to be called. It must be emphasised that separate meetings of members and creditors have to be called. And that where there are different classes of members or creditors, class meetings may have to be called (*Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573, CA; *Re Hellenic & General Trust Ltd* [1975] 3 All ER 382; *Re Jax Marine-Pty Ltd* [1967] 1 NSWR 145; and *Re Gazette Constructions Pty Ltd* [1984] 10 ACLR 140). Put in another way, s. 176(1) of the Companies Act 1965 gives the court the power to order scheme creditors to the discussion table in order to meet and vote over the proposal. If this is not the case, then we will have the situation where the creditors may not turn up for the meeting thereby frustrating any attempt to have the proposals voted upon and approved. However, the court will simply refuse to call for a meeting if it considers that the scheme will not be approved (*Re Savoy Hotel Ltd* [1981] Ch 351; and *Twenty First Century Oil Sdn Bhd v. Bank of Commerce (M) Bhd (No 2)* [1993] 2 MLJ 353).

I will now briefly allude to s. 176(3) of the Companies Act 1965. This is an important statutory provision. It is the central piece of the statutory regime in relation to the mechanism wherein the court is able to bind any dissenting creditor to the scheme. The philosophy behind this lies in the principle that the decision of the majority ought to prevail. The courts in Singapore and Australia where similar provisions to s. 176(3) of the Companies Act 1965 exist, categorically stated that the provisions in question provide a machinery to overcome the impossibility or impracticability of obtaining individual consent of every member of the class intended to be bound by the scheme, and, to prevent, in appropriate circumstances, the minority of the class members from frustrating a beneficial scheme (*Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd* [2001] 4 SLR 35, 46, 47, which cited, with approval, the speech of Street J, in *Re Norfolk Island and Byron Bay Whaling Co* [1969] 90 WN (Pt 1) (NSW) 351 at 354 as well as the speech of Bray CJ in *Re A and C Constructions* [1970] SASR 565, 568, and the speech of McLelland J, in *Re Glendale Land Development (in liquidation)* [1982] 7 ACLR 171).

It appears to me that the role of the court in a s. 176 application is purely as a facilitator. The court merely acts as a court of law. It does not interfere in the debt restructuring process and it does not actively involve itself in the negotiation nor does it concern itself with the commercial advantages or disadvantages of the proposal. It is entirely up to the creditors to decide (S*ri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 2 MLJ 31; and *In the Matter of Chevron (Sydney) Ltd* (1962) Vic Lexis 368); after

all, according to Vaughan Williams J, in the case of *In re English, Scottish, And Australian Chartered Bank* [1893] Ch D 385, at 409:

> If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, but there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.
>
> While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the court to shew that there has been some material oversight or miscarriage.

Notwithstanding all these, the courts still retain control of the proceedings because the company is obliged under the law to go back to the courts at every stage of the s. 176 exercise (*Re K Rees Emporiums Ltd* [1969] Vic Lexis 156). To summarise, I must say that in a s. 176 application the court needs only to be concerned that the statutory provisions of s. 176 are complied with and that the court has the inherent power to prevent an abuse of its process and towards this end, the court would decline to invoke its power under s. 176 in respect of any proposal which is frivolous, vexatious, embarrassing or is bound to fail in limine. The court will not permit a scheme which is not viable, feasible, workable or intelligible from being put before the creditor because to do so would be a waste of time since the creditor would certainly reject the proposal (*Twenty First Century Oils Sdn. Bhd. v. Bank Of Commerce (M) Bhd & Ors (No 2)* [1993] 2 CLJ 677 at 680; *Crystal Establishment Berhad & Ors v. Hong Leong Bank Berhad & Ors* [2000] 1 LNS 44; and *FT Eastment & Sons Pty Ltd v. Metal Roof Decking Supplies Pty Ltd* [1977] 3 ACLR 69). It is germane to mention that in exercising its discretion under s. 176(1) of the Companies Act 1965, the court is entitled to take and may take into account public interest including the question of commercial morality (*Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd (supra)*).

Estoppel Against The Intervenor

The intervenor must be estopped from raising the complaints against the proposed composite scheme. The scheme of compromise and arrangement was

proposed to the intervenor on 5 May 2003, 7 May 2003, and 10 December 2003 and on this basis it can be surmised that the intervenor was made aware of the following salient facts:

(a) that DRB would be the major financial contributor to the scheme;

(b) that the class of creditors subject to the scheme are the hire purchase creditors of the second applicant with corporate guarantees from DRB;

(c) that the second applicant will sell its buses and the bus related assets to Syarikat Prasarana Negara Berhad ("SPNB");

(d) that the monies received under the sale proceeds would be paid to the creditors of the second applicant;

(e) that the sums owing to the scheme creditors would be compromised to their debt as at the cut off date as at 3 June 2003;

(f) that the repayment under the proposed scheme would run for a period of seven years;

(g) that the proposed scheme would be carried through under the s. 176 regime; and

(h) that the intervenor was, at all times being the hire purchase creditor of the second applicant with a corporate guarantee from DRB, proposed to be the scheme creditor.

It is undisputed that the intervenor was aware of the RO that was granted by the court on 21 June 2003 together with the extension thereof on 16 March 2004. The intervenor requested and was served with the application and the supporting papers filed into court for the former application on 3.7.2003 and the later application on 1 April 2004 together with the application under s. 176(10C) of the Companies Act 1965 for leave to dispose of the assets to SPNB on 1 April 2004 (see exh. "DMN-B" of encl. 12). The intervenor has also applied to intervene in the RO Suit on 16 February 2004 which was filed on a non-urgent basis and the second applicant consented to that on 24 March 2004. So, it cannot be doubted that the intervenor was kept informed of the nature of the proposed scheme and the steps taken to bring the scheme to fruition. The intervenor never applied to challenge or set aside the proposed scheme or the RO on any basis when it had the chance to do so since mid 2003. Far from being concerned about issues of commercial morality, the intervenor at all material times were only interested in the amount of money they could recover under the proposed scheme. On their own admission, the intervenor said that if they were offered between RM13.5 million to RM17

million, they would consider the scheme. In order to accommodate the intervenor, the proposed scheme was then put up with feedback from the scheme creditors including the fact that the intervenor wanted between RM13.5 million to RM17 million and the applicants then advanced the proposed composite scheme where the intervenor would recover in the region of RM13.5 million. It must be emphasised that no objection was ever raised as to the intervenor's propriety as a scheme creditor. Somehow, in a round about turn, the intervenor now purports to set aside the entire proposal and the meeting to consider it. On the above facts, the doctrine of estoppel must be activated against the intervenor. The intervenor must be estopped by approbation and reprobation from:

(a) contending that they would not consider the proposed composite scheme at court convened meetings;

(b) contending that the proposed composite scheme was unsustainable; and

(c) contending that they are not part of the class of creditors which the applicants are aiming for notwithstanding the fact that they are hire purchase creditors with corporate guarantee from DRB.

In simple language, estoppel may be described in this way. A person is precluded from denying the existence of a state of affairs which he has previously asserted. It is said that estoppel is not a cause of action but rather a rule of evidence (*Dawson's Bank Ltd v. Nippon Menkwa Kabushiki Kaisha* [1935] LR 62 Ind App 100 at 108); and that no action can be founded upon an estoppel (*Low v. Bouverie* [1891] 3 Ch. 82). When a person by words or conduct (*Hopgood v. Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA) made to another person in a clear and unequivocal representation of fact (*Woodhouse AC Israel Cocoa Ltd SA v. Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 768, [1972] 2 All ER 271 at 291, HL), either with knowledge of its falsehood or with the intention that it should be acted upon, just like what the intervenor did, the doctrine of estoppel would be activated and would be construed against the person who has made the representation either by words or conduct. In the context of the present case, estoppel should be construed against the intervenor. Perhaps the best definition of the doctrine of estoppel is found in the case of *Maclaine v. Gatty* [1921] 1 AC 376 at 386, HL, where Lord Birkenhead LC succinctly said:

> Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.

That simple definition would aptly apply to the intervenor in all its splendour.

Another Originating Summons Vide No: D1-24-93-2003

By way of an alternative argument, the intervenor would be barred from proceeding with prayers (4) and (5) of encl. 9. There is another suit between the second applicant, DRB and the intervenor in the commercial one court *vide* originating summons no: D1-24-93-2003 before Vincent Ng J. In that case, the presiding judge in the person of Vincent Ng J, had, from time to time, been informed of the progress of the present case before me in particular in regard to the progress of the s. 176 application. On 27 April 2004, Vincent Ng J, in the D1 matter had ordered that the intervenor be restrained by way of an injunction from presenting a winding-up petition on the second applicant and/or DRB until the sanction of the proposed scheme has been finalised. It is implicit in the order of Vincent Ng J, that the proposed scheme be allowed to take its course under s. 176 of the Companies Act 1965. This meant that the proposed scheme should be allowed to proceed for meetings and so forth. Thus, in so far as the intervenor was concerned, the effect of the injunction order was that the intervenor had been ordered to allow the proposed scheme under s. 176 to proceed for meetings and, if appropriate, to be sanctioned. If the intervenor were to do anything to fetter the s. 176 process it would tantamount to an attempt by the intervenor to frustrate the injunction order and it would ultimately represent a collateral challenge against the injunction order. The attempt by the intervenor to stop the proposed scheme from being tendered in the court convened meeting on 28 May 2004 by way of encl. 9 was certainly unlawful because it represented a collateral attempt to destroy the injunction order (*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141, FC). The only proper way would be for the intervenor to appeal against the injunction order and not to proceed by way of encl. 9. It seems that the intervenor has not filed any appeal against the injunction order.

The Proposed Composite Scheme

It is now ideal to say something about the proposed composite scheme.

It must be recalled to mind that the first applicant is the holding company of the second applicant. The first applicant holds 67.2% shareholding of the second applicant. For various reasons as reflected in paragraph 6 of encl. 3, the applicants encountered financial difficulties and decided to make a debt re-structuring proposal to their creditors. The events leading to the making of the proposed composite scheme are amply set out in paragraphs 3 to 18 of encl. 3 and I do not propose to set them out here. Now, the proposed composite scheme comprises of two schemes. One scheme is conducted by

the second applicant and it is referred to as the "scheme A", while the other is a scheme conducted by the first applicant and it is referred to as the "scheme B". An elaborate description of the composite scheme can be found at paras. 19 to 25 of encl. 3 and it is set out in detail in the explanatory statement exhibited as exh. "YTY1" of encl. 10. Although the proposed composite scheme comprises of two schemes, yet the end object of both the schemes is the same. It is to address the debts owing to a class of creditors of the second applicant and that would be the hire purchase creditors of the second applicant with the corporate guarantee from DRB including the intervenor. As demonstrated earlier, the language of ss. 176(1) and 176(10) of the Companies Act 1965 permit a company to propose a debt compromise or arrangement with a class of its creditors. It is a fact that initially the proposed composite scheme did not include the first applicant. Scheme B was only proposed to the scheme creditors on 10 December 2003 (see exh. "DMN4" of encl. 3). But the introduction of scheme B had the effect of substituting the second applicant for the first applicant as the payer of the proceeds under the scheme. The respective entitlement of the scheme creditors did not change materially. The respective returns ton the scheme creditors under the scheme exclusive of interest are amply set out in the table at para. (C) at p. 10 of the explanatory statement (see exh. "DMN1" of encl. 3). And once the scheme creditors are paid under scheme A, then the balance of the scheme debt from the second applicant to the scheme creditors will be novated to the first applicant and settled by way of scheme B. And that part of the debts to be settled *vide* scheme B will be guaranteed by DRB – referring to the termed out debts, and that it is a feature of scheme B that DRB will issue guarantee documents to the scheme creditors. Put in another way, the scheme creditors will have direct legal recourse against DRB in the event of any default in scheme B.

It is a requirement in scheme A that the scheme creditors give up their respective guarantees with DRB in favour of uniform replacement guarantees to be issued in scheme B. It is a common place in any scheme that the payment terms and respective entitlements to any class of creditors must not be different. It is a feature of the proposed composite scheme that DRB issues the guarantee documents first and only after that does the scheme creditors deliver the existing guarantees back to DRB. In short, the scheme creditors does not need to deliver up the existing guarantees if DRB does not issue the replacement guarantees on the effective date. Should this happen, the existing guarantees with DRB will not be compromised in any way save for the amounts already received by the scheme creditors under the proposed composite scheme.

The Complaints Of The Intervenor As Per Encl. 9

I reiterate that the role of this court in the s. 176 process is purely one of facilitator and so this court should be slow to interfere in matters pertaining to commerce. This court should be vigilant by ensuring that any stipulated requirements under s. 176 is complied with and that there should not be any abuse of the process of this court.

The intervenor's complaints may be stated in this fashion:

(a) Insolvency

That the applicants are insolvent and ought to be liquidated. The proposed composite scheme does not return the applicants to the stage of solvency and it serves no useful purpose. The proposed composite scheme is a liquidation scheme.

(b) Likelihood of payment of the termed out debts

It is doubtful whether the first applicant would be able to pay the termed out debts. It is also doubtful whether DRB will honour the replacement guarantee.

(c) Collateral purpose

That the proposed composite scheme has the collateral purpose of relieving DRB of its guarantees to scheme creditors when it has the ability to honour the guarantees.

(d) *Ultra vires* s. 176 of the Companies Act 1965

That the discharge of the existing guarantees given by DRB is ultra vires s. 176.

(e) Uncertainty

That it remains uncertain whether DRB will actually issue the replacement guarantees envisaged in scheme B.

(f) Seven years

That the seven years repayment period under scheme B is too long and is fraught with uncertainty.

(g) Classification

That the intervenor is a judgment creditor and that its rights under the hire purchase agreements and guarantee with DRB have merged into the judgment. So, it is suggested that the intervenor ought not to be classed with the scheme creditors.

(h) Non-compliance with the Rules of the High Court 1980

That the applicants have not complied with O. 88 r. 5(g) of the Rules of the High Court 1980.

(i) Hearing inter partes of encl. (1)

That encl. one (1) ought to have been heard inter partes.

Rebuttals by the applicants of the complaints by the intervenor

It is now opportune to set out the rebuttals of the applicants.

(a) Insolvency

The applicants are in financial distress and they are finding it difficult to meet its debts as they become due. The object of the proposed composite scheme is to address the group representing the largest creditors of the second applicant. The object of the scheme is to settle the largest creditors and return the applicants to a position where they are able to continue to trade. Seen in this perspective, the proposed composite scheme is not a liquidation scheme.

The suggestion by the intervenor that the essence of the scheme is to effect liquidation is totally baseless. The sale and purchase agreement with SPNB shows that it is a long term business venture envisaged for the second applicant. In any event, the second applicant has already been awarded two intermediate contracts and this certainly augurs well for the second applicant. It must be borne in mind that encl. 9 and the present originating summons do not invoke s. 218 of the Companies Act 1965 and so it would be improper to make any finding of insolvency. According to Siti Norma Yaakob J (now FCJ) in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd (supra)* at p. 831.

> The test of the insolvency of any company must be viewed in the commercial sense, that is, its inability to meet current demands irrespective of whether the company is possessed of assets, which if realised, would enable it to discharge its liability in full.

Now, even if the applicants were, for a fact, insolvent that does not preclude the applicants from embarking on a scheme of arrangements under s. 176 of the Companies Act 1965 (*Re Avram Investments Pty Ltd* [1992] 8 ACSR 574 at 577; *Re Egnia Pty Ltd (in liq)* [1991] 6 ACSR 640 at 642; *Wangsini Sdn Bhd v. Grand United Holdings Bhd* [1997] 5 CLJ 664 at 675; and *Re Wu Investments Pty Ltd* [1993] 10 ACSR 636). I even venture to say that even in the absence of the scheme under s. 176 of the Companies Act 1965, there are reported cases which show that when faced with a winding-up petition under s. 218 of the Companies Act 1965, the courts have refused to wind up an insolvent company in order to give that company another chance (*Kim Wah Theatre Sdn Bhd v. Fahlum Development Sdn Bhd* [1990] 2 MLJ 511; *Pilecon Engineering Bhd v. Ramaja Jaya Sdn Bhd* [1997] 1 MLJ 808; and *Wei Giap Construction Co (Pte) Ltd. v. Intraco Ltd* [1979] 2 MLJ 4). The aforesaid cases clearly show that even if there were no arrangements proposed under s. 176 of the Companies Act 1965, it is increasingly the practice of the insolvency courts that where the majority of the creditors oppose the winding up, the court will not exercise its discretion under s. 218 of the Companies Act 1965 to wind up.

Here before me, the salient facts clearly show that:

(1) There is evidence that 13 out of 14 of the scheme creditors representing approximately 87% of the debt to the scheme creditors have in principle agreed to the proposed composite scheme.

(2) On the available evidence, the intervenor is the sole dissenting scheme creditor.

(3) The applicants will be able to resume trading with the implementation of the proposed composite scheme.

(4) The scheme creditors need not be concerned with the financial strength of the second applicant as the sums paid under scheme A are derived from the sale of the assets to SPNB and the proceeds thereof are paid directly by SPNB to a payment agent for payment to the scheme creditors. Thereafter, the balance of the debts will be novated to the first applicant and the scheme creditors will cease to be the creditors of the second applicant.

(5) The evidence shows that the proposed composite scheme will be more advantageous to the scheme creditor and it would certainly prevent the applicants' from being put under liquidation.

Even if the intervenor was right that the applicants' case ought to be dealt with in an insolvency court, that will not change the fact that the applicants would be able to propose the proposed composite scheme as an arrangement under the winding-up proceedings which proceedings would in any event be stayed pending the outcome of the scheme (*In Re Foursea Construction (M) Sdn Bhd* [1998] 3 CLJ 135). It must be borne in mind that the vast majority of the scheme creditors prefer to consider the proposed composite scheme to a liquidation. For these reasons, I say that the intervenor's complaints are entirely without merits.

(b) Likelihood of payment of termed out debts

It has been maintained in the proposals made to the scheme creditors that the funds for the termed out debts will be made available by way of financial assistance from DRB. It is for this reason that the replacement guarantees are made available by DRB to the scheme creditors. In this way, it gives the scheme creditors direct access and recourse to DRB in the event of any default.

It must be emphasised that the scheme creditors will not be obliged to deliver up the existing guarantees until DRB issues the replacement guarantees. This court needs only to consider whether there is a legal framework available to the scheme creditors to enforce the replacement guarantees against DRB for the termed out debts. In this context, the proposed composite scheme is different from the one contemplated in the case of *Sri Hartamas (supra)* where the court there found that the failure to build into the scheme a direct recourse to a financial contributor to the scheme rendered the scheme prejudicial to the creditors.

At any rate, whatever doubts the intervenor may have about the character of DRB or the applicants for that matter, it is an irrelevant consideration and it is not an issue here. If the intervenor were to be so distrustful of DRB or the applicants it would be reflected when the intervenor casts its vote on 28 May 2004.

(c) Collateral purpose

This is another complaint of the intervenor. It is without merit. There is nothing in law which prohibits a creditor from agreeing with the principal debtor to discharge a guarantee it has with any third party provided that such agreement to discharge is expressed with some measure of certainty (*Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd (supra)*). This is essentially what is

proposed in scheme B and henceforth DRB shall issue the replacement guarantees to the scheme creditors to achieve uniformity in terms. The intervenor is free to arrive at its own interpretation. Whatever the intervenor may read into the proposed composite scheme is entirely left to its own imagination. But the applicants hold the view that what is being proposed is not illegal or unusual. It is obviously important that where the debt of the principal debtor is compromised it is only normal that the guarantor's liability be accordingly reduced. If the intervenor is unhappy with the proposed composite scheme, it is entitled to voice its dissatisfaction and perhaps influence the other scheme creditors and vote against the scheme on 28 May 2004.

(d) *Ultra vires* s. 176 of the Companies Act 1965

The proposal to discharge the existing guarantees and replace them with the replacement guarantees do not offend and do not exceed the scope of s. 176 of the Companies Act 1965. I reiterate that there is nothing wrong with the creditor and the principal debtor in agreeing to release the guarantor. A s. 176 scheme once sanctioned is binding on the parties. It is as if a contract had been entered between the company and all the scheme creditors (*Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd (supra)*). The only difference between a fully contractual scheme entered into with all the scheme creditors and a s. 176 scheme is this. It attracts the application of s. 176(3) of the Companies Act 1965 which allows the court to sanction and impose the terms of the s. 176 scheme on any dissenting creditors. It is now trite law that a guarantor may be released by contract in the context of s. 176 of the Companies Act 1965. And that the release of any third party guarantee is well within the scope and ambit of s. 176 of the Companies Act 1965. All these legal propositions are supported by the Court of Appeal decision of Singapore in the case of *Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd (supra)*. In my judgment, the proposal to discharge the existing guarantees and replace them with the replacement guarantees do not offend and do not exceed the scope of s. 176 of the Companies Act 1965.

(e) Uncertainty

I agree that it is not uncertain as to whether DRB would actually issue the replacement guarantees envisaged in scheme B. In fact, the scheme creditors are not obliged to deliver up their existing guarantees unless the replacement guarantees are in fact issued. Be that as it may, there is a positive averment by DRB. At para. 7 of encl. 2, DRB has confirmed by affidavit that they will be issuing the replacement guarantees.

(f) Seven years

I should not be concerned with this issue. The length of time by which the termed out debts are proposed to be settled is a matter which properly belongs to the meeting on 28 May 2004. In any event, it is part and parcel of the proposed composite scheme that the scheme creditors be paid interest within the seven years period. Sad to say that as to what is uncertain about the seven years as alleged by the intervenor in para. 19 of its affidavit in reply is not disclosed to the applicants nor to this court.

(g) Classification

The intervenor should be estopped from denying that it is part of the class of creditors identified as hire purchase creditors of the second applicant with corporate guarantee from DRB. According to the case of *Butterworth Products & Industries Sdn Bhd, Re* [1991] 3 CLJ 1762; [1991] 2 CLJ (Rep) 385, the mere fact that a creditor has or has not obtained judgment does not convert the interest of the creditor to such a different nature that the creditor has to be in a class of its own.

The intervenor alleged that it ought to be classed separately from the other scheme creditors by virtue of the judgment which it obtained. However, it is incumbent on the part of the intervenor to show that by having the judgment its rights are so dissimilar as to make it "impossible for them to consult together with a view to their common interest" (*Butterworth Products & Industries Sdn Bhd, Re (supra)* at p. 387). But alas, the intervenor has not alleged anything of this nature and so there is no material before this court to support any suggestion of a wrong classification.

(h) Non-compliance with the Rules of the High Court 1980 ("RHC")

It is the contention of the intervenor that the applicants ought to have filed encl. one by way of a petition in accordance with O. 88 r. 5 of the RHC. With respect, that contention is baseless. The specific provision in relation to s. 176 of the Companies Act 1965 is contained in O. 88 r. 5(g) of the RHC which relates to an application to sanction a scheme under s. 176 (3) of the Companies Act 1965. And that the relevant rule which governs an application under s. 176(1) of the Companies Act 1965 is O. 88 r. 2(1) of the RHC which prescribes a procedure by way of an originating summons. That being the case, encl. one that was taken out by the applicants by way of an originating summons are perfectly in order and it cannot be said to be in breach of the RHC.

(i) Hearing *inter partes* of encl. (1)

Since encl. 9 has been heard by this court on a full scale basis, the question of whether encl. (1) ought to have been heard *inter partes* has become irrelevant. It must be borne in mind that the intervenor has sought and obtained an order to intervene and the submissions in regard to encl. 9 are akin to having heard encl. (1) on an *inter partes* basis. Moreover there is no allegation by the intervenor that the applicants did not provide full and frank disclosure.

Conclusion

It is ideal, at this juncture, to summarise what has been said in this judgment bearing in mind that I have taken the arduous route to consider the submissions of the parties in relation to encl. 9.

Now, when addressing a s. 176(1) of the Companies Act 1965 application, the court will generally order a meeting where (*Re K Rees Emporium Ltd* [1969] VR 981):

(a) the requisite qualifications in s. 176 are met;

(b) there exists a *bona fide* proposal for compromise or arrangement; and

(c) it was proposed to summon the creditors in an appropriate manner.

It cannot be denied that whilst the court will grant the order upon compliance with the three aforesaid ingredients, nonetheless the court still retains the discretion to refuse to grant the order (*Re K Rees Emporium Ltd (supra)*).

I must categorically say that the proposed composite scheme is fair and reasonable. It must be borne in mind that 13 out of the 14 scheme creditors have agreed, in principle, to support the scheme. Thus, in all likelihood the proposed composite scheme would be approved on 28 May 2004 by the majority of the scheme creditors in compliance with s. 176(3) of the Companies Act 1965. The intervenor is the sole dissenter. The intervenor is saying that the proposed composite scheme is not commercially viable. A lone voice in the wilderness. Thirteen (13) out of fourteen (14) scheme creditors say that it is commercially viable and they are men of commerce. I have no choice but to exercise my discretion by allowing the proposed composite scheme to be considered and voted upon at the meeting scheduled on 28 May 2004. I must decline to interfere in what 13 out of 14 creditors feel that the proposed composite scheme is reasonable and ought to be voted upon.

It must be emphasised that the proposed composite scheme is still subject to amendments at the meeting on 28 May 2004 and there could be changes made to the terms thereto. So, whatever dissatisfactions that might exist they ought to be ventilated at the meeting.

The intervenor has failed to show that the proposed composite scheme is really bad in that it was bound to fail. The intervenor too has failed to show that it is an abuse of the process of the court to allow the proposed composite scheme to proceed. The intervenor has also failed to show that the proposed composite scheme is of such a nature and couched in such terms that the court would not be likely to approve it on the hearing of the unopposed petition if the statutory majority is obtained at the appropriate meeting of the creditors within the meaning of the tests as stipulated in *Re K Rees Emporium Ltd (supra)*. There is also a failure on the part of the intervenor to show that the proposed composite scheme could not be supported by sensible business people and that to go ahead with the meeting would be a waste of time and money (*Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 CLJ 677). Indeed the converse is true. The likely scenario would be that the proposed composite scheme will be approved on 28 May 2004 and in the process thereto the intervenor would be heavily outvoted.

It seems to me that the intervenor by way of encl. 9 is attempting to scuttle the proposed composite scheme at the 11th hour notwithstanding the fact that the applicants and other scheme creditors are prepared to consider the scheme on 28 May 2004. I must allow the majority to have their say as intended by s. 176 of the Companies Act 1965.

In the circumstances, for all the reasons as adumbrated in this judgment, the intervenor has failed to make out a case in encl. 9. I must, accordingly, dismiss prayers (3), (4), (6) and (7) of encl. 9 with costs. Incidentally, the parties agreed on 27 May 2004 that prayer (5) of encl. 9 should be withdrawn and, so, it was accordingly struck out.